No. 3985

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA,
Appellant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

AND

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,
Appellees.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

KENNARD-ANDERSON PRESS

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Appellees.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

E. G. DAVIS, United States District Attorney,

McKEEN F. MORROW, Assistant United States District Attorney,
Boise, Idaho,
Attorneys for Appellant.

ROBERT E. McFARLAND,
St. Maries, Idaho,

ROGER G. WEARNE,
Coeur d'Alene, Idaho,
Attorneys for Appellees.

INDEX

In the District Court of the United States in and for the District of Idaho, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG AND F. H. TRUMMEL,

Defendants.

BILL OF COMPLAINT.

Complainant complains of the defendants above named and for cause of action alleges as follows:

I.

That this bill is brought by J. L. McClear, United States Attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States of America.

II.

That the defendant Benewah County is one of the legal subdivisions of the State of Idaho and is a body politic and corporate and vested with the power and authority delegated to it by the said state to assess, levy and collect, by its duly constituted and qualified officers, all state, county, municipal and special taxes upon property within said county not legally exempt from such taxation.

III.

That the defendants, A. C. Wunderlick, C. A. Walker, and W. R. Armstrong, are the duly elected, qualified and acting commissioners of said county, and as such constitute the Board of Commissioners thereof, and that the defendant, F. H. Trummel, is the duly elected, qualified and acting Assessor and Tax Collector of said county.

IV.

That heretofore, pusuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Morris Antelope, a member of said tribe and as such a ward of the United States, certain land lying within said county, and being a part of the Coeur d'Alene Indian reservation, to-wit, lots 1, 2, 3 and 4, section 24, township 45 north, range 6 west, Boise Meridian, containing 178.80 acres; that said land was at all times herein mentioned, and now is, held in trust by the United States for the said Morris Antelope, a ward of the United States as aforesaid, for the use and benefit of said ward according to the said laws and decrees, and as such is not, and was not, taxable by said county through its said officers.

V.

That heretofore, the said county acting by its said officials, commencing in the year 1917, and annually ever since then, has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and

special taxes upon and against the lands above described; that said county by its said officials has in each of said years made a purported and pretended assessment and levy of such taxes upon and against all of said lands and has attempted to enforce the collection and payment of such taxes, that acting agreeably to the mode and process set forth by the statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of the same, from year to year, and has conducted purported and pretended sales of the same as advertised for the purpose of collecting pretended delinquent taxes levied upon said lands as aforesaid; that pursuant to said sales, said county by its said officials has issued certain certificates which purport and pretend to evidence the sale of said lands for pretended and delinquent taxes; that complainant and its attorney herein is informed and believes, and therefore alleges, that certain of said certificates are held by said county and certain others have been issued or assigned to certain individuals whose names are unknown.

VI.

That complainant herein and its said attorney are not informed as to the exact amount of said taxes and therefore the same are not stated.

VII.

That the said county and other defendants herein, acting as officials of said county, are threatening to, and

will, continue to assess and levy similar pretended taxes in each future year hereafter, and are threatening to, and will, continue to conduct pretended sales of said lands on account of said levies, and to issue certificates of a like nature as the other certificates hereinbefore referred to, and are threatening to, and will, execute and deliver tax deeds for said lands and each and every tract and parcel of the same to the holders or purchasers of said certificates already issued, which deeds will purport to convey to such holders or purchasers title to said land and to every part thereof in fee simple; that the proceedings already had by said county and through its said officials, and the threatened proceedings, all of which are hereinbefore fully set forth, do and will constitute a cloud upon the rightful and lawful title to said lands held in trust by the United States as aforesaid; that complainant herein and its said ward will suffer great and irreparable injury unless the same is prevented by the order and decree of this Honorable Court as herein prayed; that complainant and its said ward have no plain, speedy or adequate remedy at law in the premises.

WHEREFORE, complainant prays that the said assessments and levies of taxes already made against said lands be declared null and void; that it be decreed by this Honorable Court that each assessment and levy so made against said lands are illegal and of no effect; that each certificate of sale and each deed executed pursuant to any such sale, whether now outstanding or hereafter to be

made and given, is null and void and that each of the same be delivered up for cancellation and be thereupon cancelled by order of this Court; that the defendants herein and their successors in office be enjoined and restrained from taking further proceedings under said assessments and levies of taxes already made, and be enjoined and restrained from further assessing or levying taxes against said lands or any part thereof at any future time so long as complainant may hold its present title to said lands or any part thereof;

That it be further adjudged, ordered and decreed that the defendants have no estate, right title or interest whatever in or to said lands or any part thereof, and that the defendants and all of them be forever debarred and enjoined from asserting any claim whatever in or to said premises adverse to the rights, title and interest of this complainant and its said ward in and to said lands, and that defendants be forever restrained from disposing or attempting to dispose of any pretended interest that they may claim in or to said lands.

Complainant further prays for such other and further relief in the premises as may seem equitable, together with complainant's costs herein laid out and expended.

J. L. McCLEAR,

United States Attorney for the District of Idaho.

STATE OF IDAHO,
County of Ada, } ss.

J. L. McClear, being first duly sworn, deposes and says that he is attorney for the complainant in the above entitled cause; that he has read the foregoing bill of complaint, and that he believes the facts stated therein to be true.

J. L. McCLEAR.

Subscribed and sworn to before me this 29th day of December, 1921.

W. D. McREYNOLDS,
(Seal) *Clerk, U. S. District Court.*
By PEARL E. ZANGER,
Deputy Clerk.

Endorsed, Filed Dec. 29, 1921.
W. D. McREYNOLDS, Clerk.
By PEARL E. ZANGER, Deputy.

(Title of Court and Cause)

No. 781

ANSWER

Now comes the above named defendants and for answer to the complaint of plaintiff herein, alleges:

I.

Defendants admit the allegations of Paragraph I of plaintiff's complaint.

II.

Defendants admit the allegations of Paragraph II of plaintiff's complaint.

III.

Defendants admit the allegations of Paragraph III of plaintiff's complaint.

IV.

Answering Paragraph IV of plaintiff's complaint, defendants admit that heretofore pursuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Morris Antelope, a member of said tribe, and as such a ward of the United States, certain lands lying within said county, and being a part of the Coeur d'Alene Indian Reservation, to-wit, Lots One (1), Two (2), Three (3) and Four (4), Section 4, Township 45 North, Range 6 West, Boise Meridian, containing 178.80 acres, but deny that said land was at all times hereinafter mentioned, or now is, or at any time hereinafter mentioned subsequent to the year 1916, held in trust by the United States for the said Morris Antelope, a ward of the United States as aforesaid, for the use or benefit of said ward, or otherwise according to said laws or decrees, or otherwise, or at all, or that such is not, or was not, taxable by said county through its said officers.

V.

Answering Paragraph V of plaintiff's complaint, defendants admit that the said county acting by said offi-

cials, commencing in the year 1917, and annually ever since then, up to but not including the year 1921, has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and special taxes upon and against the lands above described, and that said county by said officials has in each of said years made an assessment and levy of such taxes upon and against all of said lands and premises and has attempted to enforce the collection and payment of such taxes, and that acting agreeably to the mode and process set forth by the statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of the same, from year to year, and has conducted sales of the same as advertised for the purpose of collecting delinquent taxes levied upon said lands aforesaid, and that pursuant to said sales said county by its officials has executed certain certificates to evidence the sale of said lands for said delinquent taxes, and that certain of said certificates are held by said county, and certain others have been issued or assigned to certain individuals whose names are unknown.

VI.

Defendants admit the allegations of Paragraph VI of said complaint.

VII.

Answering Paragraph 7 of said complaint defendants deny that the said county, or other defendants herein, or any of them, acting as said officials of said county, or oth-

erwise, are threatening to or will continue to assess or levy similar or other pretended taxes in each or any future year hereafter, or are threatening to or will continue to conduct pretended sales or any sales of said lands on account of said levies, or to issue certificates of a like nature as the other certificates hereinbefore referred to; deny that complainant herein or its ward, will suffer great or irreparable, or any injury unless the same is prevented by order or decree of this honorable court, and deny that complainant or its said ward has no speedy, plain or adequate remedy at law in the premises.

And for another, further and affirmative answer to plaintiff's complaint, defendants allege:

I.

That during the year 1916, or prior thereto, Morris Antelope was duly and regularly declared by the Commissioner of Indian Affairs, to be competent, and in the year 1916, there issued to said Morris Antelope from the United States government, a patent in fee to Lots 1, 2, 3 and 4, Section 24, Township 45 North, Range 6 West, Boise Meridian, containing 178.80 acres.

II.

That pursuant to the statutes of the State of Idaho, in such cases made and provided, said land was duly and regularly assessed for taxes for the years 1917, 1918. 1919 and 1920, and during said years the said Morris Antelope was holding said lands and premises in fee simple,

and the order or judgment of the said Commissioner of Indian Affairs adjudging him competent had never been revoked.

III.

That the said Morris Antelope did not, nor did anyone on his account or in his behalf, pay the said taxes assessed upon said lands and premises for the years 1917, 1918, 1919 or 1920, except taxes for the year 1917, which were paid under protest by the Indian Agent of the Coeur d'Alene Indian Reservation for and on behalf of the said Morris Antelope.

IV.

That the said lands and premises were duly and regularly sold for the taxes for the years 1918, 1919 and 1920, the certificate of sale for the taxes of 1918, were issued to some party to defendants unknown, and the certificates for the taxes for the years 1919 and 1920, were duly and regularly issued to Benewah County, who is now the owner and holder of the same.

V.

That in the year 1921, the United States, for some reason unknown to defendants, or either of them, revoked the patent heretofore issued to Morris Antelope, and taxes were not levied or assessed on account of said lands and premises for the year 1921.

VI.

That the moneys collected by reason of the sale of said lands and premises for delinquent taxes and the taxes

collected for the year 1917, have been apportioned and paid to the State of Idaho, and should plaintiff recover the taxes paid on behalf of said Morris Antelope, or should said tax certificates be cancelled and annulled, the said Benewah County could not recover the moneys arising from said taxes and sales and apportioned and paid to the State of Idaho.

WHEREFORE defendants pray that this action be dismissed, plaintiff take nothing by its complaint, and the defendants recover their costs in this behalf laid out and expended.

ROBT. E. McFARLAND,
Attorney for Defendants,
Residence and P. O. Address:
St. Maries, Idaho.

State of Idaho,
County of Benewah. } ss.

F. H. TRUMMEL, being first duly sworn, deposes and says:

That he is one of the defendants in the foregoing and above entitled action; that he makes this affidavit for and on behalf of all of the defendants, for the reason that he is familiar with the facts set forth in the foregoing answer; that he has read the within and foregoing answer. knows the contents thereof and that he believes the facts therein stated to be true.

F. H. TRUMMEL,

Subscribed and sworn to before me this 25th day of February, A. D. 1922.

(Seal) ROBT. E. McFARLAND,
Notary Public in and for the State of Idaho, residing at St. Maries, Benewah County.

Endorsed.
Filed Feb. 27, 1922.
W. D. McREYNOLDS,
Clerk.
By L. M. LARSON,
Deputy.

(Title of Court and Cause)

No. 781

ORDER.

WHEREAS in the above entitled action, the facts involved having been stipulated and agreed upon by the complainant and defendants by and through their respective counsel, and it appearing that the above entitled action may properly be consolidated with the case of United States of America, Complainant, vs. Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith, Defendants, now pending in the above entitled court.

WHEREFORE, upon motion of the parties hereto, by and through their respective counsel, it is hereby OR-

DERED and this does order that the above entitled action be consolidated with that of the United States vs. Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith.

Done in open court at Coeur d'Alene, Kootenia County, Idaho, this 22nd day of May, 1922.

FRANK S. DIETRICH,

Judge of the District Court of the United States of America in and for the District of Idaho, Northern Division.

Endorsed. Filed May 22, 1922.

W. D. McREYNOLDS,

Clerk.

(Title of Court and Cause)

No. 781.

DECREE.

This cause came on to be heard at a previous stated term, E. G. Davis, United States District Attorney, appearing as solicitor for plaintiff, and Robert E. McFarland, County Attorney of the defendant county, appearing as solicitor for the defendants, and a written stipulation of facts having been signed and filed, covering the issues both in this case and No. 782, consolidated therewith for convenience of trial, and the cause having been submitted upon said stipulation, together with the ex-

hibits and pleadings, and upon written briefs, and, upon consideration, it having been held that upon such record the facts therein disclosed do not entitle the plaintiff to any relief, as appears from the written opinion heretofore filed herein and in said companion case, No. 782.

Now therefore, in consideration of the premises, it is ordered and decreed that the above-entitled cause be, and the same is, hereby dismissed, with prejudice, but without costs.

Dated this 27th day of November, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Nov. 27, 1922.
W. D. McREYNOLDS,
Clerk.

In the District Court of the United States in and for the District of Idaho, Northern Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,
Defendants.

No. 782.

BILL OF COMPLAINT

Complainant complains of the defendants above named and for cause of action alleges as follows:

I.

That this bill is brought by J. L. McClear, United States Attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States of America.

II.

That the defendant Kootenai County is one of the legal subdivisions of the State of Idaho and is a body politic and corporate and vested with the power and authority delegated to it by the said state to assess, levy and collect by its duly constituted and qualified officers, all state, county, municipal and special taxes upon property within said county not legally exempt from such taxation.

III.

That the defendants, Hans Johnson, J. W. McCrea and Frank A. Morris, are the duly elected, qualified and acting commissioners of said county, and as such constitute the Board of Commissioners thereof, and that the defendant, S. H. Smith, is the duly elected, qualified and acting assessor and tax collector of said county.

IV.

That heretofore, pursuant to the laws of the United States and the treaties then and now existing between the

United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Anasta Williams Smo, a member of said tribe and as such a ward of the United States, certain land lying within said county, and being a part of the Coeur d'Alene Indian Reservation, to-wit, the north half (N½) of section twenty (20), township forty-seven (47) north, range five (5) west, Boise Meridian, containing one hundred sixty (160) acres; that said land was at all times herein mentioned, and now is, held in trust by the United States for the said Anasta Williams Smo, a ward of the United States as aforesaid, for the use and benefit of said ward according to the said laws and decrees, and as such is not, and was not, taxable by said county through its said officers;

V.

That heretofore, the said county acting by its said officials, commencing in the year 1917, and annually ever since then, has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and special taxes upon and against the lands above described; that said county by its said officials has in each of said years made a purported and pretended assessment and levy of such taxes upon and against all of said lands and has attempted to enforce the collection and payment of such taxes, that acting agreeably to the mode and process set forth by the statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of

the same, from year to year, and has conducted purported and pretended sales of the same as advertised for the purpose of collecting pretended delinquent taxes levied upon said lands as aforesaid; that pursuant to said sales, said county by its said officials has issued certain certificates which purport and pretend to evidence the sale of said lands for pretended and delinquent taxes; that complainant and its attorney herein is informed and believes, and therefore alleges, that certain of said certificates are held by said county and certain others have been issued or assigned to certain individuals whose names are unknown.

VI.

That complainant herein and its said attorney are not informed as to the exact amount of said taxes and therefore the same are not stated.

VII.

That the said county and other defendants herein, acting as officials of said county, are threatening to, and will, continue to assess and levy similar pretended taxes in each future year hereafter, and are threatening to, and will, continue to conduct pretended sales of said lands on account of said levies, and to issue certificates of a like nature as the other certificates hereinbefore referred to, and are threatening to, and will, execute and deliver tax deeds for said lands and each and every tract and parcel of the same to the holders or purchasers of said certificates already issued, which deeds will purport to convey

to such holders or purchasers title to said land and to every part thereof in fee simple; that the proceedings already had by said county and through its said officials, and the threatened proceedings, all of which are hereinbefore fully set forth, do and will constitute a cloud upon the rightful and lawful title to said lands held in trust by the United States as aforesaid; that complainant herein and its said ward will suffer great and irreparable injury unless the same is prevented by the order and decree of this Honorable Court as herein prayed; that complainant and its said ward have no plain, speedy or adequate remedy at law in the premises.

WHEREFORE, complainant prays that the said assessments and levies or taxes already made against said lands be declared null and void; that it be decreed by this Honorable Court that each assessment and levy so made against said lands are illegal and of no effect; that each certificate of sale and each deed executed pursuant to any such sale, whether now outstanding or hereafter to be made and given, is null and void and that each of the same be delivered up for cancellation and be thereupon cancelled by order of this Court; that the defendants herein and their successors in office be enjoined and restrained from taking further proceedings under said assessments and levies of taxes already made, and be enjoined and restrained from further assessing or levying taxes against said lands or any part thereof at any future time so long as complainant may hold its present title to said lands or any part thereof;

That it be further adjudged, ordered and decreed that the defendants have no estate, right, title or interest whatever in or to said lands or any part thereof, and that the defendants and all of them be forever debarred and enjoined from asserting any claim whatever in or to said premises adverse to the rights, title and interest of this complainant and its said ward in and to said lands, and that defendants be forever restrained from disposing or attempting to dispose of any pretended interest that they may claim in or to said lands.

Complainant further prays for such other and further relief in the premises as may seem equitable, together with complainant's costs herein laid out and expended.

J. L. McCLEAR,
United States Attorney for the District of Idaho.

STATE OF IDAHO,
County of Ada. } ss.

J. L. McClear, being first duly sworn, deposes and says that he is attorney for the complainant in the above entitled cause; that he has read the foregoing bill of complaint, and that he believes the facts stated therein to be true.

J. L. McCLEAR,

Subscribed and sworn to before me this 29th day of December, 1921.

W. D. McREYNOLDS,
Clerk, U. S. District Court.
(Seal) By PEARL E. ZANGER,
Deputy.

Endorsed, filed Dec. 29, 1921.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

No. 782.

ANSWER.

Come now the above named defendants and answering the complaint in the above entitled action deny, allege and affirm as follows, to-wit:

I.

Defendants admit Paragraphs I and II of said complaint as fully as though herein set forth in full.

II.

Answering Paragraphs III of plaintiff's complaint defendants admit that Hans Johnson, J. W. McCrea and Frank A. Morris are the duly elected, qualified and acting commissioners of said county and as such constitute

the board of county commissioners thereof, and admit the defendant, S. H. Smith is the duly elected, qualified and acting assessor of said county, but deny that said S. H. Smith is the duly elected, qualified or acting tax collector of Kootenai County.

III.

Answering Paragraph IV of said complaint defendants admit that heretofore, pursuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, there was allotted in severalty to one Anasta Williams Smo, a member of said tribe and as such a ward of the United States, certain land lying within said county, and being a part of the Coeur d'Alene Indian Reservation, to-wit, the north half (N½) of section twenty (20), township forty-seven (47) north, range five (5) west, Boise meridian, containing one hundred sixty (160) acres. Defendants deny that said land was at all times herein mentioned and now is, held in trust by the United States for the said Anasta Williams Smo, ward of the United States as aforesaid, for the use and benefit of said ward according to said laws and decrees and deny that as such the same is not, and was not taxable by said county through its said officers.

IV.

Answering Paragraph V, defendants admit that heretofore the said county acting by its said officials commencing in the year 1917 and annually ever since then

has claimed and asserted a legal right to assess, levy and collect certain state, county, municipal and special taxes upon and against the land above described, and deny that said county by its said officials has in each of said years made a purported or pretended assessment and levy of such taxes upon and against all of said lands, and allege that a valid and lawful assessment and levy of such taxes was made upon and against all of said lands and has attempted to enforce the collection and payment of said taxes and that acting agreeably to the mode and process set forth by the Statutes of the State of Idaho, the said county by its said officials has advertised certain sales of said lands and of each tract and parcel of the same from year to year, and deny that said county has conducted purported or pretended sales of the same as advertised for the purpose of collecting pretended delinquent taxes levied upon the land as aforesaid, and alleges the fact to be that said county has conducted lawful and valid sales of the same for the purpose of collecting lawful and valid delinquent taxes levied upon said lands as aforesaid; that, pusuant to said sales, said county, by its said officials has issued certain certificates which purport and pretend to and in truth and in fact do evidence the sale of said lands for said delinquent taxes and defendants deny that said certificates so issued merely purport or pretend to evidence the sale of said lands and deny that the same are for pretended delinquent taxes. Defendants admit that certain of said certificates are held by said county and that certain others have been issued or as-

signed to certain individuals but deny sufficient knowledge or information upon which to form a belief whether or not the names of such individuals are known to complainant or to complainant's attorney herein and, therefore, deny the same.

V.

Answering Paragraph VI of said complaint defendants allege that the exact amount of said taxes and each and every item thereof constitute a part and portion of the public records of Kootenai County, Idaho, and, therefore, deny that complainant herein or its attorney are not informed as to the exact amount of said taxes.

VI.

Answering Paragraph VII defendants deny that the said county and other defendants herein acting as officials of said county are threatening to and will continue to assess and levy similar pretended taxes in each future year hereafter and allege that said defendants will continue to assess and levy similar valid and lawful taxes so long as they have the lawful right so to do and defendants deny that they are threatening to or will continue to conduct pretended sales of said lands on account of said levies and allege that they will so long as they have the legal right so to do, conduct valid and lawful sales of said lands on account of said lawful and valid levies and issue certificates of a like nature as the other certificates hereinbefore referred to and so long as they have the lawful right so to do will execute and deliver tax deeds for said

lands and each and every tract or parcel of the same to the owners or purchasers of said certificates already issued which said deeds will purport to and will, in fact, convey to such holders or purchasers title to said land and to every part thereof in fee simple. Defendants deny that the proceedings already had by said county and through its said officials or the threatened proceedings or any other proceedings had or threatened or proposed or any of which are hereinbefore in said complaint fully or otherwise set forth, do or will, constitute a cloud upon the rightful and lawful title to said lands held in trust by the United States as aforesaid or otherwise and allege that said proceedings herein had, or in contemplation, do and will effect the title to the lands of Anasta Williams Smo held in severalty by him.

Defendants deny that complainant herein or its said alleged ward will suffer great or irreparable or any injury unless the same is prevented by order and decree of this Honorable Court as in said complaint prayed, and deny that complainant or its said ward have no plain, speedy or adequate remedy at law in the premises, and allege that Anasta Williams Smo, the alleged ward of complainant, has a plain, speedy and adequate remedy at law in the payment of the taxes and assessments legally levied, assessed and imposed upon said lands by the said Kootenai County, Idaho, and its said officers in pursuance of the laws of the State of Idaho.

Furthering answering plaintiff's complaint and by way

of affirmative answer defendants deny, allege and affirm as follows, to-wit:

I.

Defendants admit that for some time prior to the time when the lien of tax for the year 1917 attached to real estate in Kootenai County, Idaho, in conformity with the laws of Idaho, said Anasta Williams Smo was a ward of the United States and held as an allotment the land in the complaint herein described, but that some time prior to the year 1917, the exact date of which is unknown to these defendants, patent to said land issued to the said Anasta Williams Smo from the United States and thereupon said Anasta Williams Smo became and was the owner in fee simple of the lands in said patent described and that thereupon the same were assessed for taxes by the proper officers of Kootenai County, Idaho, in conformity with the laws of Idaho and that the same have been so assessed and other proceedings held as provided by the laws of Idaho for the levying and collection of taxes.

II.

That during the year 1917 it became necessary and expedient to construct a public highway across the above described land and an attempt to secure right of way therefor from said Anasta Williams Smo in an amicable manner and to adjust the reasonable value thereof with the said Anasta Williams Smo was made by the proper officers of Kootenai County, Idaho, without success, whereupon an action to condemn said right of way in ac-

cordance with the laws of Idaho was instituted in the District Court of the Eighth Judicial District in and for the State of Idaho, County of Kootenai, in which said action Kootenai County, a municipal corporation, was plaintiff and Anasta Williams Smo was defendant and that appraisers were in due course appointed and fixed the award of damages to be paid said Anasta Williams Smo in the sum of One Hundred Forty Dollars ($140.00), which said sum was in due course paid by said Kootenai County on the 9th day of May, 1918, to said Anasta Williams Smo and that in addition to the said sum of One Hundred Forty Dollars ($140.00) Kootenai County, Idaho, was required to, and did pay and sustain the costs of said action in the sum of.....
amounting in all to the sum of $140.00 with interest thereon at the rate of 7% per annum from and after the 9th day of May, 1918; that said proceeding was had and said payments made by the said Kootenai County in the bona fide belief and assumption that said land was owned by Anasta Williams Smo in fee simple and he was dealt with according to the law and practice of the State of Idaho providing for the condemnation of public right of way across the land of citizens of Idaho, and had said Anasta Williams Smo at said time been a bona fide ward of the United States and the said described land held for said Anasta Williams Smo as such ward said right of way could undoubtedly have been secured without the necessity of said condemnation action or the losses to said Kootenai County in payments and costs through said ac-

tion sustained; that no part of said sum so expended by Kootenai County has ever been paid or tendered to Kootenai County by said Anasta Williams Smo or by anyone in his behalf and said Kootenai County is at this time damaged in the said sum as hereinbefore set forth with interest thereon at the rate of 7% per annum from the date of payment thereof.

WHEREFORE defendants pray judgment against plaintiff that:

I.

That plaintiff take nothing by said action and for defendants' costs and disbursements herein expended.

II.

That this Honorable Court make and enter findings and judgment herein that the patent heretofore issued to said Anasta Williams Smo then and there conveyed said land to said Anasta Williams Smo in fee simple and that the same then and there became subject to the assessment, levy and collection of taxes under the laws of the State of Idaho, and that dfendants were within their lawful rights in so levying, assessing and attempting to collect said taxes.

III.

Defendants further pray that in the event that this Honorable Court should find and determine said property was not subject to said taxes then, and in that event, that said Anasta Williams Smo, the alleged ward of plaintiff. be required to refund to and reimburse Kootenai County,

Idaho, in the sum of $140.00, being the amount paid same Anasta Williams Smo by said Kootenai County for said right of way, together with costs and interest thereon.

IV.

For such other and further relief as to the Honorable Court shall seem just and equitable in the premises and for general relief.

ROGER G. WEARNE,
Prosecuting Attorney of Kootenai County, Idaho,
Attorney for Defendants.
Residence and Postoffice Address,
Coeur d'Alene, Idaho.

STATE OF IDAHO,
County of Kootenai. } ss.

Hans Johnson, being first duly sworn, deposes and says:

That he is the Chairman of the Board of County Commissioners of Kootenai County, Idaho, one of the defendants in the above entitled action and that he makes this verification for and on behalf of all of said defendants; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

HANS JOHNSON.

Subscribed and sworn to before me this 30th day of January, 1922.

ROGER G. WEARNE,
(Seal) Notary Public for Idaho,
Residing at Coeur d'Alene, Idaho.

Endorsed. Filed Feb. 4, 1922.
W. D. McREYNOLDS,
Clerk.

By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

No. 782

ORDER.

WHEREAS in the above entitled action, the facts involved having been stipulated and agreed upon by the complainant and defendants by and through their respective counsel, and it appearing that the above entitled action may properly be consolidated with the case of United States of America, Complainant, vs. Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong and F. H. Trummel, Defendants now pending in the above entitled court.

WHEREFORE, upon motion of the parties hereto, by and through their respective counsel, it is hereby ORDERED and this does order that the above entitled ac-

tion be consolidated with that of the United States vs. Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong and F. H. Trummel.

DONE IN OPEN COURT at Coeur d'Alene, Kootenai County, Idaho, this 22nd day of May, 1922.

FRANK S. DIETRICH,

Judge of the District Court of the United States of America, in and for the District of Idaho, Northern Division.

Endorsed, Filed May 22, 1922.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause)

No. 782

DECREE.

This cause came on to be heard at a previous stated term, E. G. Davis, United States District Attorney, appearing as solicitor for plaintiff, and Roger G. Wearne, County Attorney of the defendant county, appearing as solicitor for the defendants, and a written stipulation of facts having been signed and filed, covering the issues both in this case and No. 781, consolidated therewith for convenience of trial, and the cause having been submitted upon said stipulation, together with the exhibits and pleadings, and upon written briefs, and, upon considera-

tion, it having been held that upon such record the facts therein disclosed do not entitle the plaintiff to any relief, as appears from the written opinion heretofore filed herein and in said companion case No. 781.

Now, therefore, in consideration of the premises, it is ordered and decreed that the above-entitled cause be, and the same is, hereby dismissed, with prejudice, but without costs.

Dated this 27th day of November, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Nov. 27, 1922.
W. D. McREYNOLDS,
Clerk.

CONSOLIDATED CAUSES

Nos. 781 and 782.

STIPULATION OF FACTS.

Come now the above entitled parties in the above entitled action, by and through their respective counsel, the actions of the United States of America vs. Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith, and of the United States of America vs. Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong and F. H. Trummel, having been consolidated, and stipulate as follows:

I.

That pursuant to the laws of the United States and the treaties then and now existing between the United States and the Coeur d'Alene tribe of Indians, a trust patent was issued to one Morris Antelope, a member of said tribe, to certain land lying within Benewah County, Idaho, and being a part of the Coeur d'Alene Indian Reservation, to wit, Lots 1, 2, 3 and 4, Section 24, Township 45 North, Range 6 West Boise Meridian, containing 178.80 acres, and that in the same year a trust patent was issued to one Anasta Williams Smo, a member of the said Coeur d'Alene tribe of Indians, to certain land within Kootenai County, Idaho, and being a part of the Coeur d'Alene Indian Reservation, to wit, the North Half (N½) of Section Twenty (20), Township 47 North, Range 5 West, Boise Meridian, containing 160 acres.

II.

That in the year 1916 the said Morris Antelope and the said Anasta Williams Smo were duly and regularly declared by the Secretary of Interior to be competent and in the year 1916 there issued to the said Morris Antelope and to the said Anasta Williams Smo patents in fee to the above described lands.

III.

That the said Morris Antelope and the said Anasta Williams Smo refused to accept said patents in fee at the time they were issued and still continue to refuse to accept the same.

IV.

That pursuant to the statutes of the State of Idaho the said lands were duly and regularly assessed for taxes for the years 1917, 1918, 1919 and 1920 and that during said years the order or judgment of the said Secretary of the Interior adjudging said Indians competent had never been revoked and that said fee patents of said Indians during all of said time had never been revoked and were held subject and ready for delivery but said Indians refused to accept same. That on or about January 6, 1921, the Secretary of the Interior did revoke the fee patents theretofore issued to said Indians but which said Indians had refused to accept.

V.

That the 1917 tax on the land of Morris Antelope, amounting to $272.41, has been paid to the proper officer of Benewah County, Idaho, under protest, and the 1917 taxes on the land of Anasta Williams Smo, amounting to $325.62, was paid to the proper officer of Kootenai County, Idaho, under protest. That there remains due, unpaid and delinquent under said assessment for the years 1918, 1919 and 1920 upon the land of Morris Antelope the sum of $1264.81, and there remains due, unpaid and delinquent under said assessment for the years 1918, 1919 and 1920 upon the land of Antasta Williams Smo $810.20, for which delinquent certificates have been issued and are outstanding, agreeable to the law and practice of the State of Idaho in such case made and provided.

In January, 1921, due notice was filed in the County Assessor's offices of Kootenai and Benewah Counties, respectively, of the cancellation of said patents by the Secretary of the Interior and no assessments of taxes subsequent to that date have been made.

VI.

That said Indians have never alienated or attempted to alienate any of said lands with the exception of Morris Antelope's having sold to Benewah County, Idaho, and executed deed for same, a right of way for public highway for the considerationo of $125.00, subsequent to the issue of the fee patent and prior to the cancellation thereof, and condemnation for right of way for public highway across the herein described lands of Anasta Williams Smo was had through the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, and the sum of $140.00 through said action paid to same Smo for right of way for said public highway. That in said condemnation action the said Anasta Williams Smo was dealt with as a citizen Indian and condemnation of right of way was carried on according to the law of Idaho in such case made and provided.

VII.

That between the years 1916 and 1921 the Department of the Interior treated the said Morris Antelope and Anasta Williams Smo as citizen Indians and that the defendants proceeded upon said assumption in their actions herein involved.

VIII.

The purpose of this action is to determine the legality of the asseessment and collection of these taxes and the status of the Indians from the time of the issuance of the patent in fee in 1916 until the time of the cancellation in January, 1921, and their status at the present time, and also the legality of the proceedings under which rights of way for public highway were secured.

Dated this 22nd day of May, 1922.

E. G. DAVIS,
FRED CRANE,
United States District Attorneys.
ROBT. E. McFARLAND,
Prosecuting Attorney Benewah County, Idaho.
ROGER G. WEARNE,
Prosecuting Attorney Kootenai County, Idaho.

Endorsed. Filed May 22, 1922.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

CONSOLDIATED CAUSES
Nos. 781 and 782.
SUPPLEMENTAL STIPULATION OF FACTS.

Supplemental to the stipulation of facts heretofore entered into in the above entitled cause of action, it is further stipulated as follows:

I.

That the trust patent issued to Morris Antelope, as recited in paragraph I of the stipulation of facts heretofore entered into in this cause, was signed on the 16th day of December, 1909.

II.

That the trust patent similarly shown to have been issued to Anasta Williams Smo was signed on the 16th day of December, 1909.

III.

That the granting language of said trust patents, omitting the name of the trust patentee, is as follows:

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior July 13, 1909, whereby it appears that....., an Indian of the Coeur d'Alene tribe or band, has been allotted the following described land:

.....

.....

"NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said ....., the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said In-

dian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period; but in the event said Indian does die before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said land, or cause said land to be sold for the benefit of said heirs as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States."

Dated this 19th day of August, 1922.

E. G. DAVIS,
United States Attorney for the District of Idaho.

ROBT. E. McFARLAND,
Prosecuting Attorney for Benewah County, Idaho.

ROGER G. WEARNE,
Prosecuting Attorney for Kootenai County, Idaho.

Endorsed. Filed Sept. 15, 1922.
W. D. McREYNOLDS,
Clerk.

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs.

Washington, September 6, 1922.

I, E. B. Merritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) E. B. MERRITT,
Assistant Commissioner.

THE SECRETARY OF THE INTERIOR
WASHINGTON

February 10, 1919.

Dear Judge Sells:

Please look over this memorandum which I have requested from Mr. Mundell, and come to me some day this week with your comments on it. I look favorably upon his suggestions.

Cordially yours,
FRANKLIN K. LANE.

Hon. Cato Sells,
Commissioner of Indian Affairs.

5-1100

Refer in reply to the following:

Address only the Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

March 7, 1919.

(Copies of this letter was mailed to all Superintendents on the attached list, Mar. 7, '19.)

E. S. SHERMERHORN.

You are requested to submit to this office, at the earliest practicable date, a list of all Indians of one-half or less Indian blood, who are able-bodied and mentally competent, twenty-one years of age or over, together with a description of the land allotted to said Indians, and the number of the allotment. It is intended to issue patents in fee simple to such Indians. Advise the office at once the approximate date when this list can be furnished.

Sincerely yours,

CATO SELLS,
Commissioner.

Approved:

FRANKLIN K. LANE,
Secretary.

5-1102

Refer in reply
to the following:

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington.

March 7, 1919.

You are requested to submit to this office, at the earliest practicable date, a list of all Indians of one-half or less Indian blood, who are able-bodied and mentally competent, twenty-one years of age or over, together with a description of the land allotted to said Indians, and the number of the allotment. It is intended to issue patents in fee simple to such Indians. Advise the office at once the approximate date when this list can be furnished.

Sincerely yours,
CATO SELLS,
Commissioner.

Approved:
FRANKLIN K. LANE,
Secretary.

DEPARTMENT OF THE INTERIOR
Washington.

February First,
1919.

Hon Franklin K. Lane,
Secretary of the Interior,
Washington, D. C.
Dear Sir:

Complying with your request for a plan for expediting the issuance of patents in fee to competent Indians, I

have studied the situation and talked with many members of the office of the Commissioner of Indian Affairs. Aside from advising an increase in the number of competency commissions, few of those I interviewed had anything of value to offer in the way of suggestions.

After going into the matter as thoroughly as my limited investigation would permit, I have several suggestions to make which I believe will assist the Government in ridding itself of the responsibility of acting as guardian for the Indians, at least in a great measure.

At the present time there are but two competency commissions in the field and until recently there was never more than one at work. Of these two, one has not been engaged in work for the past thirty days or more, a member, Major McLaughlin, having been in Washington for that time. I am told that there are approximately 330,000 Indians in the nation and of these but 19,000 odd have been given their patents in fee. At the present rate of progress it would be many years before the work of issuing patents is finished.

Under the law, the Secretary of the Interior has the power to issue patents and the speed with which he can do this is limited to the number of recommendations filed with him by the competency commissions, unless, of course, legislation is resorted to in making possible the wholesale issuance of patents. Such legislation would not be advisable as it would be manifestly unfair to the Indian to declare him competent without first having determined that he was so.

In order to carry on this work more rapidly, I suggest that the number of men engaged in examining Indians with regard to their competency be increased. The present competency commission is composed of three men. These commissions can be cut to two men or even one, as the Secretary of the Interior elects.

I suggest that each agency superintendent be instructed to immediately begin an examination of the Indians in his charge for the purpose of determining their competency. His report bearing recommendations may be filed separately from that of the commissioner or commission. His work need in no wise conflict with that done by a commission or commissioner but will act as a check on the recommendations of the commission or commissioner. If there developed a difference of opinion between the agency suprintendent and the commission or commissioner, then a third agent could be sent out to examine into the particular case in question.

Of all persons in the service, the agency superintendent should be best equipped to determine the competency of an Indian. He has his subjects under almost daily observation. While it is a fact that some of the Indians live miles from the agency headquarters, there is nothing to prevent the superintendent going to that Indian and investigating his competency. The superintendent should be required to render a certain number of recommendations each month and a minimum number that he shall file should be fixed by the Secretary of the Interior.

Under the above system you have either two or three men passing upon the competency of the Indians and if your superintendent's report are filed separately and confidently they can act as a deciding vote when a difference of opinion occurs. Personally I think that the judgment of two good men is as good as that of three. By cutting your competency commissions to one-man commissions and putting about ten men in the field, in addition to the superintendents working at the same time, rapid progress would be made.

Some objection will naturally be made to the too rapid issuance of patents. It will be held that from eighty to ninety per cent of those Indians securing patents will sell their lands and many of them, being unable or not desiring to work, will become public cares. The answer to that argument is that it is simply a question of how soon the Indian is to become a public charge, if at all. Eventually all competent Indians will have patents issued to them.

If the Secretary of the Interior has absolute faith in an agency superintendent, he may accept as final his recommendations in an Indian competency case. In many instances the report of a superintendent, if he is honest and able, will be as good as a report filed by three men working together and more or less absorbing each other's views. In an agency of 3,000 Indians there would probably not be over 800 to 900 adult Indians. Wherefore it should not take a superintendent any great length of time

to complete his competency investigations and file his recommendations. The superintendent already has a fund of information regarding his subjects and this information will enable him to more quickly come to a determination regarding his recommendations. With every superintendent working on this matter, in addition to ten commissioners or agents, there should be a steady flow of recommendations filing into the office of the Secretary of the Interior.

The competency commissions or commissioners may either divide the work with the agency superintendents or may work independently of them, except so far as to secure from the superintendents such information as is necessary for them to proceed with dispatch on their work. The superintendents should be ready to direct the commissions or commissioners to those Indians he thinks most competent, so that much time now wasted on palpably incompetent Indians may be saved. After those apparently competent are disposed of, the commissions or commissioners may put in their time on the Indians left so that no competent Indian escapes securing his patent in fee.

By having one-man commissions the work now being done can be tripled and with the superintendents also working, quadrupled, if no more men are employed than at present.

Another phase of the work that needs expediting is the handling of inherited lands cases. Much delay is at pres-

ent caused by the slowness in determining the legal heirs to an estate. This is due, in a measure, to the fact that many of the eighteen or twenty examiners who were on the work, went to war. Many of these are now returning and the work will soon get back to normal. It is absolutely essential that the patents be issued immediately following the determination of the legal heirs, so that deaths, etc., may not cause a multiplication of heirs and thus cause the work to be done over again.

I can see no necessity for the competency commissions and agency superintendents working together on one commission. The superintendent has many other duties which absorb a large part of his time. Members of commissions are thus compelled to delay their work, in some instances, while waiting for the convenience of the superintendent. The same results may be obtained by these men working separately and independently.

When the Secretary of the Interior is not satisfied with the findings of the various agents, he may cause a commission of any fixed number of agents to sit and take testimony, thus arriving at a general recommendation which will in all probability be a correct one.

The five civilized tribes, located all in Oklahoma, comprise one-third of the Indians in the United States. Through this fact much time of traveling about by the examining agents is done away with and thus time is saved.

One of the members of the office of Indian Affairs believes that the Declaration of Policy should be amended

to read "all Indians of one-half blood or less," instead of "all Indians of less than one-half blood." This he suggests, on the theory that the United States owes little protection to the half-blood. If this suggestion were adopted, the Government would be getting rid of a much larger number of Indians than it is now possible to dispose of. There are many half-bloods who are perfectly capable of handling their own affairs.

It is also suggested that when a trust period is to be extended, that it be extended for not more than one year, instead of ten years as has been the custom. This would prevent a loss of taxes for any great period when an Indian is declared competent before the expiration of his trust period, in view of a Federal Court decision to the effect that an Indian is not obliged to pay taxes until the end of his trust period, regardless of whether he is issued a patent in fee.

I believe that five commissions of two members or ten individuals doing the work now being done by the commissions together with the superintendents working also, can clean up the competency examination within two years at least. It will be necessary, however, for the Department of the Interior to demand of the men so engaged that they work religiously and rapidly and waste no time.

When the competency work is done, if there is still any work to be done on the inherited lands cases, the whole force could be thrown into that work and rapidly clean it up.

If there is anything further that you desire investigated or further suggestions you want made, please advise me.

Respectfully,

W. A. MUNDELL.

January Fourteenth
1919

Mr. J. J. Cotter,
Department of the Interior,
Washington, D. C.
Dear Sir:

In connection with progress of competency among the Indians of America, exclusive of the five civilized tribes, I have obtained figures which show the number declared competent from 1907 to 1919 inclusive. A summary of patents in fee issued under Act of May 8, 1906, practically shows the number of Indians declared competent and is as follows:

1907	889
1908	1,987
1909	1,166
1910	355
1911	1,011
1912	344
1913	520
1914	1,148
1915	940

1916	934
1917	2,203
1918	4,378

The following statement is made by an attache of the office of the Commissioner of Indian affairs:

"The effectiveness of the Declaration of Policy promulgated April 17, 1917, is apparent from the number of fee patents that have been issued during the calendar year. There have been issued 4,403 fee patents, involving an area of 706,404 acres, representing an approximate value of $14,128,080. The total number of fee patents issued during the eleven years preceding 1918 was 12,097 involving an area of 1,380,316 acres. It will therefore be seen that during the fiscal year 1918 fee patents issued are about one-third of the total patents issued during the eleven years preceding and the area patented is more than one-half the area patented for those eleven years.

"During the fiscal year ending June 30, 1918, 662 pieces of allotted land covering 74,126.24 acres were sold for $1,541,177.95 under the provisions of the non-competent act. There were 438 pieces covering 49,216.19 acres sold for $1,174,854.97 under the inherited act. The average price received from both alloted and inherited Indian land is $22 per acre. This is the largest average price that has ever been received from the sale of Indian land."

I find that there is no system in vogue which governs the workings of the Competency Commissions. No rule is followed in selecting the tribe or district to be visited,

except that it has been the custom for the Competency Commissions to examine first those Indians whose trust patents are about to expire. The commissions then either recommend the issuance of a patent in fee and the Indian is declared competent or the period of trust is extended.

The Competency Commission began work in 1915, some of the work done by them is now being done over, so that more satisfactory results may be obtained. The general rule is that the competent Indian does not want a patent in fee nor to be declared competent, for he then has to bear his share of the burden of taxes.

The greatest number of Indians have been declared competent since 1916 and this is due in a great measure to the Declaration of Policy. (copy attached.)

The office of the Commissioner of Indian Affairs claims to have been hampered in its work of examining Indians regarding their competency because of the limited number of men it has been able to assign to this work.

Attention is directed to Page 197 of the Annual Report of the Commissioner of Indian Affairs,

Respectfully,

W. A. MUNDELL.

Dear Mundell:

Can you by a little study outline a definite and practicable program for this work—so that it will carry on faster.

F. K. L.

Circular No.

Order No.

INDIAN SCHOOL SUPERINTENDENTS.

(Corrected to May 1, 1917)

22.—Coeur d'Alene.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, September 5, 1922.

I, E. B. Meritt, Assistant, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal) E. B. MERITT,

Assistant Commissioner.

Circular No. 1649

DEPARTMENT OF THE INTERIOR.
Office Commissioner of Indian Affairs
Washington.

Relative competency
of Indians applying
for patents in fee.

November 23, 1920

TO ALL SUPERINTENDENTS:

Before the issuance of fee patents to Indians the question of competency must be carefully considered in each case and full report submitted, showing ability to manage their own affairs as well as the average white man, regardless of blood status.

This rule will apply to cases heretofore reported and not passed upon by the Department.

Sincerely yours,

(Signed) CATO SELLS,
Commissioner.

Approved: Nov. 30, 1920.
(Signed) PAYNE,
Secretary.

DEPARTMENT OF THE INTERIOR.
Office of Indian Affairs
Washington.

April 17, 1917.

DECLARATION OF POLICY
in the
ADMINISTRATION OF INDIAN AFFAIRS.

During the past four years the efforts of the administration of Indian affairs have been largely concentrated on the following fundamental activities—the betterment of health conditions of Indians, the suppression of the liquor traffic among them, the improvement of their industrial conditions, the further development of vocational training in their schools, and the protection of the Indians' property. Rapid progress has been made along all these lines, and the work thus reorganized and revitalized will go on with increased energy, with these activities and accomplishments well under way, we are now ready to take the next step in our administrative program.

The time has come for discontinuing guardianship of all competent Indians and giving each closer attention to the incompetent that they may more speedily achieve competency.

Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration to the end that every Indian, as soon as he has been determined to

be as competent to transact his own business as the average white man, shall be given full control of his property and have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government.

Pursuant to this policy, the following rules shall be observed:

1. *PATENTS IN FEE*: To all able-bodied adult Indians of less than one-half Indian blood, there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home.

Indian students, when they are twenty-one years of age, or over, who complete the full course of instruction in the Government schoools, receive diplomas and have demonstrated competency will be so declared.

2. *SALE OF LANDS*: A liberal ruling will be adopted in the matter of passing upon applications for the sale of inherited Indian lands where the applicants retain other lands and the proceeds are to be used to improve the homesteads or for other equally good purposes. A more liberal ruling than has hitherto prevailed will hereafter be followed with regard to the applications of non-competent Indians for the sale of their lands where they are old and feeble and need the proceeds for their support.

3. *CERTIFICATES OF COMPETENCY*: The rules which are made to apply in the granting of patents in fee and the sale of lands will be made equally applicable in the matter of issuing certificates of competency.

4. *INDIVIDUAL INDIAN MONEYS*: Indians will be given unrestricted control of all their individual Indian moneys upon issuance of patents in fee or certificates of competency. Strict limitations will not be placed upon the use of funds of the old, the indigent, and the invalid.

5. *PRO RATA SHARES—TRUST FUNDS*: As speedily as possible their pro rata shares in tribal trust or other funds shall be paid to all Indians who have been declared competent, unless the legal status of such funds prevents. Where practicable the pro rata shares of incompetent Indians will be withdrawn from the Treasury and placed in banks to their individual credit.

6. *ELIMINATION OF INELIGIBLE PUPILS FROM THE GOVERNMENT INDIAN SCHOOLS*: In many of our boarding schools Indian children are being educated at Government expense whose parents are amply able to pay for their education and have public school facilities at or near their homes. Such children shall not hereafter be enrolled in Government Indian Schools supported by gratuity appropriations, except on payment of actual per capita cost and transportation.

These rules are hereby made effective, and all Indian Bureau administrative officers at Washington and in the field will be governed accordingly.

This is a new and far reaching declaration of policy. It means the dawn of a new era in Indian administration. It means that the competent Indian will no longer be treated as half ward and half citizen. It means reduced appropriations by the Government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the Nation. It means, in short, the beginning of the end of the Indian problem.

In carrying out this policy, I cherish the hopes that all real friends of the Indian race will lend their aid and hearty cooperation.

CATO SELLS,
Commissioner.

Approved:
FRANKLIN K. LANE,
Secretary.

(Title of Court and Cause.)

CONSOLIDATED
Nos. 781 and 782.
DECISION
Sept. 16, 1922.

E. G. DAVIS, *U. S. Attoorney, for Complainant.*
ROBERT E. McFARLAND, *Prosecuting Attorney for Benewah County, and*
ROGER G. WEARNE, *Prosecuting Attorney for Kootenai County, Attorneys for Defendants.*
DIETRICH, *District Judge*:

In respect to the questions in issue these two cases are

identical, and they have been submitted upon the same general stipulation of facts. Each is brought upon behalf of a Coeur d'Alene Indian, to test the validity of claims for taxes levied by the state officers upon lands belonging to the Indian. And the fundamental question is whether, when the taxes were levied, the Government still held the title in trust for the benefit of the Indians, or such trusteeship had been terminated by valid fee patents. The lands were formerly a part of the Coeur d'Alene Indian Reservation and were allotted, in the one case to Maurice Antelope and in the other to Anasta Williams Smo, 178.80 acres to the former, and 160 acres to the latter. The provision under which the allotments were made is to be found in the appropriation act of June 21, 1906, (34 Stat. 325, 335), and is as follows:

"That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments to the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman, and child, 160 acres, and upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States."

In pursuance of the authority thus conferred upon the Secretary of the Interior, he caused the lands in question to be allotted to the Indians above named, and issued

"trust patents" to them on the 16th day of December, 1909. These trust patents contained the ordinary provisions of such instruments, one of which was a declaration that the Government would "hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust, for the sole use and benefit" of the grantee.

Recently prior to the passage of this act, namely, on May 8, 1906, the general allotment act of February 8, 1887, (24 Stat. 388), and particularly Section 6 thereof, had been amended, to read as follows:

"Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States,

and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further,* That the provisions of this Act shall not extend to any Indians in the Indian Territory." (34 Stat. 182.)

When, therefore, in the Act of June 21, 1906, *supra,* authorizing the allotment of the Coeur d'Alene Reservation, the Secretary of the Interior was directed "to cause patents to issue under the provisions of the general allotment law of the United States," reference must have been intended to the Act of 1887, as amended by this Act of May 8, 1906, and accordingly the trust patents here involved were issued expressly "subject to all statutory

provisions and restrictions," including, of course, the provision of this last named act authorizing the Secretary, in his discretion, to adjudge an allottee competent and to issue to him patent in fee prior to the expiration of the twenty-five year period. Assuming to act under the authority of this provision, the Secretary, in 1916, (so it is stipulated), "duly and regularly declared" the two allottees "to be competent," and thereupon issued to them "patents in fee" for the lands in controversy, but they refused and still refuse to accept them. It is further stipulated that, pursuant to the statutes of Idaho, the lands were duly and regularly assessed for taxes for the years 1917 to 1920 inclusive, during which period neither the fee patents nor the order or judgment of the Secretary of the Interior adjudging the Indians competent had ever been revoked. It is further stipulated that on or about January 6, 1921, the Secretary of the Interior revoked the patents, but we are not advised of the circumstances of or reasons for such revocation. It is also stipulated that during the period the fee patents were outstanding, that is, from 1916 to 1921, "the Department of the Interior treated the said Maurice Antelope and Anasta Williams Smo as citizen Indians, and that the defendants (in levying taxes and taking proceedings to enforce the payment of the same) proceeded upon" the assumption that the Indians were competent and held title in fee simple to the lands. During this period the Indians did not alienate or attempt to alienate any of the lands, with the exception that Antelope sold to one of the de-

fendant counties, and executed to it a deed for,a right of way for a public highway, for a consideration of $125.00. The other county defendant secured a right of way across the land of Smo by proceedings in eminent domain, in which Smo, as defendant, was treated as a competent party, and was paid $140.00 as compensation for the right of way.

It is not disputed that so long as the Government held the title in trust, the lands were exempt from taxation, and therefore, upon the facts as stipulated, there would seem to be but a single question left to decide:— Did the adjudication by the Secretary of the Indians' competency and the subsequent issuance of patent, with tender thereof to the Indians, operate to convey the legal title, or at least to relieve the Government of its trust? The mere fact that there has never been an actual physical delivery of the patents to the grantees is not of controlling importance, for it is familiar law that a patent may be effective without actual delivery. United States v. Schurz, 102 U. S. 378. United States v. Laam, 149 Fed. 581.

With much apparent confidence the Government relies upon Morrow v. United States, 243 Fed. 854, but upon analysis of the record here it will be seen that the case has little, if any, application. In substance it is there held that a trust patent, together with the provisions of pertinent statutes in force at the time the patent is issued, constitutes a contract between the Indian and the Government, and vests in the former rights of which he can

not be divested without his consent, and that therefore it was incompetent for Congress to change the property status established by the trust patent and the provisions of existing statutory law, over the objection of the Indian patentee. The act involved in that case, by which it was attempted to shorten the trust period, and hence to deprive the Indian of the valuable right of having his property exempt from taxation, was passed after the issuance of the trust patent. Here, as we have seen, the trust patents were issued by the Secretary of the Interior in pursuance of an act providing that they should issue "under the provisions of the general allotment law of the United States," and at the time of such authorization, and thereafter when the allotments were made and the trust patents were issued, the general allotment law of the United States expressly vested in the Secretary of the Interior the discretion, and he was authorized, whenever he was satisfied that an allottee was competent and capable of managing his own affairs, to cause to be issued to him a patent in fee simple. And there was the further provision that after the issuance of such fee patent "all restrictions as to sale, incumbrance, or taxation" of the land was removed. If, therefore, we apply the doctrine of the Morrow case, we must read into the trust patents here involved these provisions of law, by which apparently the Secretary of the Interior was authorized in his discretion to shorten the trust period, and by accepting the trust patents the patentees assented to the exercise of such authority as is thus conferred upon the Secretary.

The other contention of the Government is that the power of the Secretary of the Interior to adjudge an Indian competent in any specific case and to issue to him a patent, is conditioned upon the consent of such Indian and the acceptance by him of the patent. But in this view I am unable to concur. In considering the question it will be borne in mind that there is no suggestion of fraud or mistake on the part of the Secretary of the Interior, or of irregularity in the proceedings leading up to the issuance of the patent, and the question therefore is strictly one of the power of the Secretary under the amendatory act of May 8, 1906. It will be noted that the language of the act is "that the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple." Neither expressly nor inferentially does this language disclose an intent that the power thus conferred is confined to cases where the allottees make application or otherwise give their assent. Nor is it suggested either by the status of the Indians or the general and well-known policy of the Government in respect to them. They are wards, in a state of tutelage, and presumably are not competent always to choose what is for their good. Moreover, if, as has been the policy of the Government, the Indians are to be encouraged to adopt the institutions and conform to the habits of civilized life, it is important in their case, as in the case of white people, that they pos-

sess the power to impose upon all alike the burdens of maintaining such institutions. As in other communities, so civilized Indians must have roads and schools, and police protection, and these benefits cannot ordinarily be had without taxation. If in a community of capable Indians the majority desire thus to create for themselves the conditions of civilized life, they might very well be unable to proceed if an unprogressive minority has the power to withhold their lands from taxation. The Government, too, would thus be greatly hampered in carrying out its policies, and that these considerations were in the mind of the Secretary when these patents were issued is not open to doubt. The policy of emancipating capable Indians from guardianship and investing them with the rights and responsibilities of citizenship and giving them complete control of much of their property had long been in force. The Department maintained standing Competency Commissions, whose duty it was to go about and make investigation of the capacity and competency of individual Indians, upon the various reservations, and to report their conclusions with recommendation, in order that, when the facts warranted, the competency of such individuals might be adjudged without unnecessary delay and patents in fee simple issued, for the purpose of relieving the Government from the duties of guardianship, and imposing upon such competent Indians the responsibility of caring for themselves, and of putting it within the power of communities to tax local property, in carrying out the enterprises and maintaining the institutions

of civilized life. Such strength had this view obtained that early in the year 1917, but a few months after the issuance of the fee patents here in question, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a formal "DECLARATION OF POLICY IN THE ADMINISTRATION OF INDIAN AFFAIRS," as of date April 17, 1917, from which we quote the first three paragraphs:

"During the past four years the efforts of the administration of Indian affairs have been largely concentrated on the following fundamental activities—the betterment of health conditions of Indians, the suppression of liquor traffic among them, the improvement of their industrial conditions, the further development of vocational training in their schools, and the protection of the Indians' property. Rapid progress has been made along all these lines, and the work thus reorganized and revitalized will go on with increased energy. With these activities and accomplishments well under way we are now ready to take the next step in our administrative program.

"*The time has come for discontinuing guardianship of our competent Indians and giving even closer attention to the incompetent, that they may more speedily achieve competency.*

"Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration, to the end that every Indian, as soon as he has been determined to be as competent to transact his own business as the average white man, shall be given control of his property and

have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government."

The Declaration ends with this paragraph:

"This is a new, far-reaching declaration of policy. It means the dawn of a new era in the Indian administration. It means that the competent Indian will no longer be treated as half ward and half citizen. It means reduced appropriations by the Government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the nation. It means, in short, the beginning of the end of the Indian problem."

Without going into detail, it is to be said that a perusal of departmental correspondence and documents leaves no doubt of the view of the Department that the Secretary had the authority, under the act of May 8, 1906, at any time, within his discretion, to declare the competency of an Indian and to issue to him a fee patent without his consent, or of the further view that such authority was indispensable to the successful execution of governmental policies touching the well-being and civilization of the Indians.

If then in the successful execution of well-known governmental policies toward the Indians, it is essential that the Secretary of the Interior be clothed with such authority, and the Act of May 8, 1906, seems expressly to confer it, and in the administration of Indian affairs the executive officers have for many years assumed that such was the legislative intent, upon what theory are we to adopt a

contrary view? Such power touching the property rights of Indian wards is not exceptional; it is rather the rule. By the original allotment act itself (24 Stat. 388), upon the refusal or failure of an adult Indian to select an allotment, the Secretary is authorized to make the selection for him (Sec. 2). So after lands are allotted the Secretary may, without the consent of the allottees, grant rights of way. Act May 3, 1901, 31 Stat. 1083. Act May 6, 1910, 36 Stat. 349. Act March 2, 1917, 39 Stat. 973. By the Act of January 26, 1895, as amended April 23, 1904, (28 Stat. 641, and 33 Stat. 297), the Secretary is authorized to correct mistakes in the issuance of trust patents by canceling the same. By Section 5 of the general allotment act, the President is authorized to extend the trust period beyond twenty-five years. It will hardly be suggested that before he can do this in any particular case he must have the consent of the Indian allottee. But is there not quite as much reason there as here for interpolating a provision requiring the Indian's consent? In case of the death of an Indian before final patent the Secretary may ascertain the heirs, and if he regards them as competent he "shall issue" to them patents in fee simple; but if they are incompetent the lands may be sold and the proceeds held in trust for them. Act May 29, 1908, 35 Stat. 444. Act June 25, 1910, 36 Stat. 855. Act May 18, 1916, 39 Stat. 127. By act of October 19, 1888, Section 2, (25 Stat. 612), one allotment may be exchanged for another, but the consent of the Indian interested is expressly required. Why not a similar requirement here if Congress so intended?

Upon a consideration of the whole case I have been unable to escape the conclusion that Congress intended to confer upon the Secretary of the Interior the unqualified authority, within his sound discretion, to declare an Indian allottee competent, and to issue to him a patent in fee, and that such power may be exercised without infringing any vested right of the Indian, because such was the law at the time the allotments here involved were made and the trust patents issued.

Whether the attempted revocation of the fee patents by the Secretary in 1921 was or was not effective we need not now decide; there is no suggestion in the record of the ground upon which the action was taken. By express stipulation, in the year 1916 the two Indian allottees were duly and regularly declared by the Secretary of the Interior to be competent, and thereupon the patents in fee issued. If, as we hold, the Secretary had the power to take such action without the consent of allottees, these two Indians had the status of citizens, and they were possessed of the complete title in fee simple to these lands during the entire period covered by the tax proceedings now assailed. It must therefore be held that under the provisions of the Act of May 8, 1906, the lands were subject to taxation and the taxes in question are valid. Accordingly the bill of complaint in each case will be dismissed with prejudice.

Endorsed. Filed Sept. 18, 1922.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY
Nos. 781 and 782

AFFIDAVIT IN SUPPORT OF PETITION FOR INJUNCTION PENDING APPEAL.

United States of America,
District of Idaho. } ss.

McKeen F. Morrow, being first duly sworn, deposes and says: That he is a duly qualified, appointed and acting assistant United States Attorney for the District of Idaho, and as such is familiar with the facts in the above entitled consolidated causes; that said actions were brought for the purpose of enjoining and restraining the counties of Benewah and Kootenai, and the respective county commissioners and tax collectors of said counties, from taking steps to enforce the collection of delinquent taxes against the lands described in the Bills of Complaint herein, constituting the allotments of Anasta Williams Smo and Morris Antelope, Coeur d'Alene Indians, and to restrain said counties and the said officers from issuing tax deeds thereon; that the 1917 taxes on the lands described in said complaints were paid under protest, and the 1918, 1919 and 1920 taxes went delinquent, delinquency certificates being issued for the 1918 taxes,

and delinquency entries, pursuant to the law then in force, having been made for the 1919 and 1920 taxes;

That decrees were entered in said causes on the 27th day of November, 1922, and said counties, through their proper officers, have given notice, as provided by law, that unless payment of the delinquent 1919 taxes is made by or in behalf of the said Indians on or before the 5th day of January, 1923, the said tax collectors will issue to the respective counties tax deeds as provided by law, and affiant is informed and believes that steps will also be taken in the immediate future to foreclose the delinquency certificates issued for the 1918 taxes, and to cause the issuance of tax deeds therefor;

That an appeal is now being perfected by the United States to the United States Circuit Court of Appeals for the Ninth Circuit from the said decrees made and entered November 27, 1922, and such appeal is taken in good faith and for the purpose of determining the right of the defendant counties to tax the lands allotted to said Indians under the facts shown by the record herein; and in order to determine the effect of the issuance of fee simple patents to said Indians without their consent or acceptance, in lieu of the trust patents theretofore issued to said Indians; that approximately one hundred and sixty acres of land is involved in each of said consolidated causes, and the value of said lands is greatly in excess of the amount of the taxes, together with penalties and interest, levied against the same, and in the event that it should be finally held that the lands of such Indians are subject to

taxation by the defendant counties, the said Indians will be deprived of their right to redeem the said lands from such delinquent taxes unless the said counties and their respective officers shall be enjoined and restrained by this Honorable Court from enforcing the collection of the said taxes involved herein, and from taking any steps to foreclose such delinquency certificates or to sell said lands for taxes, or to issue tax deeds therefor, pending the determination of such appeal; that in order to preserve the subject matter of this litigation and to maintain the status quo of the parties, and in order to prevent great and irreparable injury to the said Indian wards of the United States, it is necessary that such temporary injunction issue, pending the determination of said appeal.

McKEEN F. MORROW,

Subscribed and sworn to before me this 27th day of December, A. D. 1922.

W. D. McREYNOLDS,
Clerk of the U. S. District Court.
(Seal) By PEARL E. ZANGER,
Deputy.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY
Nos. 781 and 782
PETITION FOR APPEAL

The above named complaint conceived itself aggrieved by those certain decrees made and entered on the 27th day of November, 1922, in the above entitled consolidated cause, and by the decisions rendered therein on the 16th day of September, 1922, does hereby appeal from said decrees and said decision to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors filed herewith; and your petitioner prays that this appeal may be allowed, and that a transcript of the record proceedings and papers upon which said decree were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner desiring to stay the enforcement of said decrees of dismissal pending the decision of this appeal, and to preserve the subject matter of this litigation, and to protect Morris Antelope and Anasta Williams Smo, the Indians in whose behalf the above consolidated actions were brought, in their right to redeem the lands, described in the respective bills of complaint from the taxes levied by defendant counties in the event that said taxes are upheld, respectfully prays that with the allowance of this appeal the said defendants named in said bills of complaint, and each of them, and their successors in office, and any and all persons acting for or

in their behalf, may be restrained and enjoined from enforcing the collection of the said taxes referred to in the bills of complaint herein, and from taking any steps to foreclose delinquent certificates, or to sell said lands for taxes or to issue tax deeds therefor pending the determination of this appal.

The application for such stay order is based upon the records and files in this action and upon affidavits filed herein, hereby referred to and hereby made a part hereof.

E. G. DAVIS,
United States District Attorney.
McKEEN F. MORROW,
Assistant United States District Attorney.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

CONSOLIDATED CAUSES IN EQUITY
Nos. 781 and 782
ASSIGNMENT OF ERRORS.

And now comes the plaintiff, the United States of America, by the United States Attorney for the District of Idaho, and says that in the decrees made and entered in the above entitled consolidated causes on the 27th day of November, 1922, and in the decision filed therein on or about the 16th day of September, 1922, there is manifest error particularly in the following respects:

1. Because the Court erred in dismissing the bills of complaint with prejudice.

2. Because the Court erred in holding and deciding, in effect, that the trust patents issued to the Indians in question did not confer vested rights upon them to have the lands covered by their trust patents held in trust for a period of twenty-five years, and, at the end of that time, conveyed to them or their heirs, free from all charges and incumbrances whatsoever.

3. Because the Court erred in holding and deciding that said trust patents were issued to the said Indians subject to the right of the Secretary of the Interior under the Act of Congress of May 8th, 1906, in his discretion, and without the consent of such Indians, to adjudge them to be competent and to issue to them patents in fee simple the effect of which would be to render the lands taxable.

4. That the Court erred in holding and deciding that Congress had conferred upon the Secretary of the Interior the unqualified authority, within his discretion, to declare an Indian holding an allotment made after May 8th, 1906, competent and to issue him a patent in fee simple, the effect of which would be to render his lands taxable.

5. That the Court erred in holding and deciding that the Secretary of the Interior had the authority to adjudge Indian allottees competent and issue fee simple patents to them without their consent.

6. That the Court erred in holding and deciding that the fee simple patents issued to these Indians were of any force or effect prior to their acceptance by such Indians.

7. That the Court erred in failing to hold and decide that the provisions of the Act of May 8th, 1906, were nothing more than the extension of a benefit to the Indian in the nature of a privilege or election to have the trust period of his allotment curtailed, by the Secretary of the Interior, in the exercise of his discretion, and upon application by the Indian, after he had determined the Indian to be competent and capable of managing his affairs.

8. That the Court erred in holding and deciding that Congress had power to curtail the trust period of an Indian's allotment without his consent.

WHEREFORE, The said complainant prays that the decrees entered herein be reversed and set aside with directions to the said District Court to grant said injunctions as prayed for in the bills of complaint herein.

E. G. DAVIS,
United States District Attorney.
McKEEN F. MORROW,
Assistant United States District Attorney.
Solicitors for Complainant, Residence
Boise, Idaho.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CASES IN EQUITY

Nos. 781 and 782

ORDER ALLOWING APPEAL AND RESTRAINING DEFENDANTS PENDING APPEAL.

And now, to-wit: On the 30th day of December, 1922, it is ordered that the foregoing petition for appeal be granted and that said appeal be allowed as prayed for.

And the matter of restraining and enjoining the defendants hereinafter named as prayed for in said petition having come on regularly for hearing on this 30th day of December, 1922, on the records and files in this action including the assignment of errors and the petition for appeal herein and the affidavit of McKeen F. Morrow, and it appearing that the attorneys for the defendants have waived notice of such hearing and do not object to the granting of a stay order in the premises; now therefore it is hereby ordered that you, the said Benewah County, Idaho, and A. C. Wunderlick, C. A. Walker, W. R. Armstrong, and F. H. Trummel, and Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith, and each of you, and your and each of your agents, servants, employees, officers and attorneys, and the successors in office of each of you who are individual defendants and all persons acting by or under the authority or direction of you or either of you be and you are hereby restrained and enjoined from

issuing tax deeds for the years 1918, 1919 and 1920 upon the following described lands, to-wit:

Lots One (1), Two (2), Three (3) and Four (4), Section Twenty-four (24), Township Forty-five (45) North, Range Six (6) West, Boise Meridian, and

Northeast Quarter (NE¼) of Section Twenty (20), Township Forty-seven (47) North, Range Five (5) West Boise Meridian,

or to sell said lands or any portion thereof for said taxes pending the determination of this appeal and the filing of the Mandate thereon in the office of the Clerk of the United States District Court for the District of Idaho.

Dated: 30th day of December, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Dec. 30, 1922.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY.

Nos. 781 and 782

PRAECIPE.

To W. D. McReynolds, Clerk of the above entitled Court:

You will please prepare the record upon the appeal of plaintiff in the above entitled consolidated cases from those certain decrees made and entered on the 27th day of November, 1922, such record to consist of the following:

1. Complaint in the case of United States vs. Kootenai County, et al.

2. Answer in the case of United States vs. Kootenai County, et al.

3. Complaint in the case of United States vs. Benewah County, et al.

4. Answer in the case of United States vs. Benewah County, et al.

5. Orders consolidating cases.

6. Stipulation of parties as to record on appeal, including the following, by reference:

(a). Stipulation of facts, filed May 22, 1922.

(b). Supplemental stipulation of facts, filed September 15, 1922.

(c). Certified copy of declaration of policy, dated April 17, 1917.

(d). Certified copy of departmental correspondence, omitting the last page thereof, except the following: "22. Coeur d'Alene."

7. Decision of the Court.

8. Decree in United States vs. Kootenai County, et al.

9. Decree in United States vs. Benewah County, et al.

10. All papers filed in connection with this appeal, to-wit:

Assignment of errors.

Petition for appeal.

Affidavit of McKeen F. Morrow in support of petition for injunction pending appeal.

Order allowing appeal and restraining defendants pending appeal.

Citation.

This praecipe.

In preparing the above record, you will please omit the title of all pleadings except the title of the two complaints of plaintiff, and in lieu thereof, insert the words: "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will also omit the verification of all pleadings, but in lieu thereof, insert, wherever the pleading is verified, the words: "Duly verified."

Dated this 3rd day of January, 1923.

E. G. DAVIS,
United States Attorney.
McKEEN F. MORROW,
Assistant United States Attorney.
Solicitors for Plaintiff.

Affidavit of service attached.
Endorsed. Filed Jan. 4, 1923.
W. D. McREYNOLDS,
Clerk.
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause)

CONSOLIDATED CAUSES IN EQUITY

Nos. 781 and 782

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above entitled consolidated cases, through their respective attorneys, that the following constitutes all the evidence submitted to or considered by the District Court in rendering its decision herein, to-wit:

1. Stipulation of facts, filed May 22, 1922;

2. Supplemental stipulation of facts, filed September 15, 1922;

3. Certified copy of declaration of policy, dated April 17, 1917, and certified under date of September 5, 1922;

4. Certified copy of departmental correspondence in relations to declarations of competency and issuance of fee patents to Indians, certificate bearing date September 6, 1922.

IT IS FURTHER STIPULATED AND AGREED that the papers above referred to and included in this stipulation may be taken and considered by the Appellate Court in lieu of a statement of the evidence, and that the same shall be printed in full, except that the Indian Agencies on the last page of the certified copy of the departmental correspondence may be omitted except the following portion: "No. 22. Coeur d'Alene."

Dated this 5th day of January, 1923.

E. G. DAVIS,
United States Attorney.

McKEEN F. MORROW,
Assistant United States Attorney.
Solicitors for Plaintiff.

ROGER G. WEARNE,
Solicitor for Kootenai County, et al.

ROBERT E. McFARLAND,
Solicitor for Benewah County, et al.

The foregoing papers were considered by me in the trial of the case and the above stipulation is approved this 26th day of January, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed Jan. 26, 1923.

W. D. McREYNOLDS,
Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

UNITED STATES OF AMERICA, *Complainant,* vs. BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL, *Defendants.*	In Equity No. 781
UNITED STATES OF AMERICA, *Complainant,* vs. KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH, *Defendants.*	In Equity No. 782

CITATION

CONSOLIDATED

United States of America)ss:

To:

Benewah County, Idaho, A. C. Wunderlick, C. A. Walker, W. R. Armstrong, and F. H. Trummel, and Kootenai County, Idaho, Hans Johnson, J. W. McCrea, Frank A. Morris and S. H. Smith.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in

the State of California, within twenty days from the date of this writ pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein the United States of America is complainant and you and each of you are defendants, to show cause, if any there be, why the decrees in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Frank S. Dietrich, United States District Judge for the District of Idaho, this 30th day of December, A. D., 1922, and the Independence of the United States the One Hundred and Forty seventh.

FRANK S. DIETRICH,

(Seal) *District Judge.*

W. D. McREYNOLDS,

Clerk.

Service of the foregoing citation and receipt of a copy thereof acknowledged this 5th day of January, 1923.

ROGER G. WEARNE,

Attorneys for Kootenai County, et al.

Service of the foregoing citation and receipt of a copy thereof acknowledged this 5th day of January, 1923.

ROBT. E. McFARLAND,

Attorneys for Benewah County, et al.

Endorsed. Filed Jan. 16, 1923.

W. D. McREYNOLDS,

Clerk.

By PEARL E. ZANGER,

Deputy.

CLERK'S CERTIFICATE

I. W. D. McReynolds, Clerk of the District Court ofthe United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 89, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $126.55, and that the same has been paid by the appellant.

Witness my hand and the seal of said court this .....15th.....day of February, 1923.

W. D. McREYNOLDS,

(Seal) *Clerk.*